

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
December 17, 2008 Session

**STATE OF TENNESSEE v. MALCOLM DUDLEY THOMAS**

**Direct Appeal from the Circuit Court for Williamson County**  
**No. CR052678     Robert E. Lee Davies, Judge**

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**No. M2008-01191-CCA-R3-CD - Filed March 13, 2009**

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The defendant, Malcolm Dudley Thomas, was convicted of two counts of aggravated sexual battery. Subsequently, the trial court granted the defendant's motion for judgment of acquittal as to one of the counts, finding that the victim's account of the crimes was "impossible, absolutely impossible." The State filed a timely appeal, and, following our review, we conclude that the trial court erred in this ruling. Accordingly, we reinstate the defendant's conviction and the \$15,000 fine imposed by the jury and remand this matter to the trial court for entry of a judgment showing that the defendant was found guilty as to Count 3 of the indictment, charging him with aggravated sexual battery, and for sentencing for this conviction. The defendant is to be returned to custody pending sentencing.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed,  
Conviction Reinstated, and Remanded**

ALAN E. GLENN, J., delivered the opinion of the court, in which JERRY L. SMITH and D. KELLY THOMAS, JR., JJ., joined.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Mary Katherine White and Jennifer Moore, Assistant District Attorneys General, for the appellant, State of Tennessee.

Gene Honea (on appeal) and Robert H. Hassell (at trial), Franklin, Tennessee, for the appellee, Malcolm Dudley Thomas.

**OPINION**

**FACTS**

In this matter, the defendant was tried on three counts of aggravated sexual battery committed against his stepdaughter, C.S.<sup>1</sup> He was acquitted of Count 2 and convicted, as charged, of Counts 3 and 4.<sup>2</sup> At the conclusion of the trial on April 12, 2008, the trial court conducted a hearing on the defendant's motion for judgment of acquittal and granted the motion as to Count 3. As to Count 4, the trial court, *sua sponte*, granted a new trial. The record does not reflect whether the defendant has been retried on that count, but, in any event, it is not an issue in this appeal.

Although we will review the trial testimony in detail in the analysis section, we first will provide an overview of the testimony.

William Marcus Stamps, the victim's biological father, testified about the victim's custody arrangements between him and her mother and said that the victim was with him on June 29, 2006, when she told him that she needed to tell him something. He said the victim was crying, very emotional, and hyperventilating. The victim eventually got a piece of paper on which she wrote "Dudley touches me." Stamps said he did not discuss the touching with the victim but asked her if she wanted to talk to someone about it. The victim agreed to talk to Danny Shelton, a neighbor and Deputy United States Marshall.

Danny Shelton testified that he was a Deputy United States Marshall and a neighbor of the victim's biological father. He said the victim told him about the defendant's touching her "private parts," and he advised the victim's father to inform the Franklin Police Department.

Detective Becky Johnson of the Franklin Police Department testified, in detail, about her interviews with the victim. She said the victim told her of incidents when the defendant touched her breasts and "female part," put his mouth on her breasts, and had her touch his "guy part." The victim reported to Johnson that the last incidents of touching occurred right before her birthday.

Detective Johnson said that she conducted a perpetrator telephone call between the victim and the defendant on July 7, 2006, but the recording equipment malfunctioned and only the victim's side of the conversation was recorded. She said the victim was nervous and got upset when she learned her mother was with the defendant. She said that, after a few minutes, the victim's mother got on the phone and the victim became "absolutely hysterical." As to the victim's conversation with her mother, Johnson testified:

[The victim] was crying, begging her mom, mom please I'm not lying, please believe me, it got to a point where she had the phone in one hand, had her head down on the table in the interview room sobbing so hard and saying mom, I just want you to

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<sup>1</sup>It is the policy of this court to refer to minor victims of sexual abuse by their initials only.

<sup>2</sup>The State nolle prossed Count 1, charging the defendant with rape of a child, because the offense did not occur in Williamson County.

believe me, that I ended up – she was so distraught I ended up taking the phone and disconnecting the call myself.

Johnson said that Katrina Bratton of the Department of Children's Services then telephoned the victim's mother, Jane Thomas, and Johnson asked her to come to the police station, but she refused to do so. Mrs. Thomas told Johnson if she wanted to talk to her, she could come to her house and then hung up. Johnson telephoned Mrs. Thomas again and eventually had a patrol car transport her to the police station.

Johnson said that when Mrs. Thomas arrived, she was "very upset, very irate" and did not appear concerned about the victim. Johnson told Mrs. Thomas about the victim's allegations, and Mrs. Thomas immediately said, "[I]t's a lie, she's a liar." When Johnson explained to Mrs. Thomas that the victim could not have any contact with the defendant, Mrs. Thomas refused to make the defendant leave the home or to sign the necessary paperwork to allow the victim to stay with relatives or friends and told Johnson to place the victim in state custody.<sup>3</sup> Johnson said that Mrs. Thomas had "a pretty strong" odor of alcohol and was unsteady on her feet. Johnson confronted Mrs. Thomas about her intoxication, and she did not deny it. Johnson said that Mrs. Thomas tried to leave twice during the interview. Johnson said Mrs. Thomas did not contact her after the interview, and she subsequently learned that Mrs. Thomas "had counsel" and could not contact her as a result.

Lisa Dupree, a licensed clinical social worker at Our Kids Center at Nashville General Hospital, testified that the victim reported that the defendant had been touching her for five or six years and that the touching sometimes started when she was asleep. The victim also told her that the defendant had touched her breasts on numerous occasions and had made her touch "his private" one time and then said, "[W]ell, a few times, he made me rub it." Dupree said that the victim had "significant difficulty answering questions about sexual contact, and was extremely anxious and fidgety."

Hollye Gallion, a pediatric nurse practitioner at Our Kids Center, testified that she performed an anal/genital examination of the victim, and the results were normal. She said that based upon the victim's allegation of touching only, she would not expect the victim to have any physical findings.

Shelby Phillips, who said she was the victim's best friend, testified about a conversation she and the victim had during the summer of 2005 at the home of the victim's father. She said the victim told her that she felt uncomfortable going to her mother's house because the defendant had been coming into her room at night. Phillips told the victim that she was going to tell the victim's father, but the victim started crying and begged her not to. Phillips also related a subsequent conversation between her and the victim when they were on a school bus. She said the victim told her she was living with her father because the defendant had touched her. She said she did not tell the victim's

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<sup>3</sup> Because Mrs. Thomas refused to sign a safety plan for the victim, the victim was placed in state custody by the Department of Children's Services, and the Department then placed the victim with her biological father.

father or anyone else about what the victim had told her because she promised the victim she would not. Phillips said she was interviewed by Detective Johnson in August 2006 but did not know the reason for the interview until Johnson asked her if she had a friend named C.S. Phillips said she was “in shock” and “broke down” because she did not think that was the reason for the interview. She denied that she and the victim discussed the case prior to her interview.

We now will briefly describe the testimony of the defense witnesses. Katrina Bratton, an employee of the Department of Children’s Services, testified that she was present during the interview of the victim’s mother at the Franklin Police Department and that she did not smell any alcohol on her. However, she said that Detective Johnson had more exposure to Mrs. Thomas during the interview than she did. Bratton said that Mrs. Thomas was “very uncooperative,” did not appear concerned about the victim, and told her to place the victim in state custody.

Elizabeth Jane Bryant Thomas, the victim’s mother, testified about the telephone conversation she had with the victim on July 7, 2006. She said that the victim, who was crying hysterically, told her, “Mom, it’s true.” After the call ended, Mrs. Thomas received a call from Katrina Bratton instructing her to go to a particular address in Franklin, but she refused to do so because the call came in as “a private caller” and Bratton did not identify herself. Mrs. Thomas said she next received a phone call from Detective Johnson and voluntarily went to the police station by patrol car. Johnson told her that the victim had accused the defendant of “[d]igital touching and . . . abuse.” Mrs. Thomas said that her initial reaction was that the allegations were not true because the defendant and the victim had a “very good” relationship. She asked Detective Johnson if she could speak to the victim, but Johnson refused to allow her to do so. Mrs. Thomas acknowledged that she refused to sign the victim’s safety plan but said she did so because she did not want to sign anything that would change the victim’s custody arrangements. She acknowledged that she placed the victim in state custody to punish her for lying. Mrs. Thomas said she called Detective Johnson after her interview, but Johnson did not return her call. She said that she retained an attorney the next day, and her attorney advised her not to call Johnson.

Mrs. Thomas testified that the victim’s twelfth birthday party was held on June 23, 2006. She said that the victim was with her father on Saturday, June 17, and that the following day was Father’s Day. She explained that her marital dissolution agreement with the victim’s father provided that C.S. spend Mother’s Day with her and Father’s Day with her father. She said that she sent an e-mail to the victim’s father confirming that the victim would spend June 17 with him so that the victim would be with him on Father’s Day. Mrs. Thomas said that she was “[a]bsolutely” certain that the victim was not at her house on June 17 and that the victim returned to her house on Monday morning, June 19. Mrs. Thomas said that her nightly routine included retiring to her bedroom around 8:30 p.m. and watching television for about an hour before going to sleep. She said that the defendant usually watched television in the living room until 10:30 or 11:00 p.m. before going to bed. Asked if she believed what the victim said during her videotaped interviews, Mrs. Thomas said, “[C.S.] was making up wild stories. [C.S.] lied throughout the entire tape, even about things she didn’t have to.” She said that she told the victim she “would do what was needed to clean this mess up” if the victim wanted to come home but denied that she asked the victim to recant her story.

Teresa Miller testified that she had been a close friend of Mrs. Thomas and the defendant for many years and had known the victim since birth. Although the victim told Miller that the defendant had touched her, Miller did not believe her. Patricia McGee testified that she was acquainted with the victim, her mother, and the defendant. She said that, shortly after the victim made the allegations about the defendant, the victim behaved normally on a school trip at which McGee accompanied the students.

The defendant testified at length, denying that he ever touched the victim inappropriately.

The State presented two rebuttal witnesses. Kim Brown, the victim's maternal aunt, testified that the victim was a truthful child and she had never known her to tell a lie. Christine Karl, Shelby Phillips' mother, testified that both her daughter and the victim were truthful.

### ANALYSIS

In granting the defendant's motion for judgment of acquittal as to Count 3, the trial court gave a lengthy explanation of the court's view of the evidence and rationale for granting the motion:

I have before me a motion that the defense made for a Judgment of Acquittal. I actually am . . . considering a judgment of acquittal as to Counts Two and Three.<sup>4</sup>

Now, with regard to a Judgment of Acquittal, what the Court does is weigh the sufficiency of the evidence . . . in the light most favorable to the State of Tennessee. What that means is whether any rational trier of fact could have found the essential elements beyond a reasonable doubt.

To do this, I focus entirely on the testimony of the victim in this case . . . .

As to those two counts, and – well, as to virtually everything she said, she said she was asleep unless she woke up; and when she woke up, the Defendant was doing things to her. She testified when she woke up, she hit him, she told him to stop, or to get out, and he would immediately stop and leave every time. Or if she was awake, she would tell him to stop, or not let him touch her every time.

Based on [the victim's] testimony, I find it to be physically impossible for these things to have occurred on June 17th and June 19th. The victim was either asleep or the victim was either awake. If the victim was asleep, it would be absolutely impossible to describe what happened. However, if she was awake,

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<sup>4</sup>The defendant was acquitted as to Count 2 and convicted as to Counts 3 and 4. Accordingly, we presume that in referring to Counts 2 and 3, the trial court was speaking of Counts 3 and 4.

according to her own testimony, she immediately told the Defendant to stop, and he did.

Now, this conduct that she described that took place at one occurrence, according to the Bill of Particulars and according to her testimony, was this: The Defendant touched the victim's vagina with his hand, the Defendant touched the victim's breast with his hand, the Defendant put his mouth on the victim's breast. In both counts – I find that impossible, absolutely impossible, based on her own testimony.

I grant a Motion for Judgment of Acquittal on Count Two and Count Three. I'm not through.

. . . .

I would grant it on Count Four in this case, but there is a shred, the tiniest shred, of evidence, taken in the light most favorable to the State, that some touching took place, according to the victim.

But now I exercise my next Constitutional duty, and that is as the 13th juror in this case.

Rule 33 requires the Court to independently weigh the evidence and assess every witness's credibility that appeared before me, and I am not satisfied, not even close to being satisfied, with this verdict.

I find the testimony of [the victim] to be not credible. She was impeached repeatedly by her own testimony and by the testimony of other witnesses in this case. She gave improbable testimony. Examples: The Defendant pulled down her pants, but not off, on – around her knees, around her shin, around her ankles. Somehow, . . . the Defendant spread her legs without ripping those clothes, and while standing over her, put his mouth on her genital area.

That's just – that's amazing.

Her demeanor on the first tape shows a 12-year-old laughing, joking, stretching, yawning, and playing with her cell phone; completely inconsistent with a child who is disclosing this type of abuse by her step-dad for the last six or seven years, over 500 times.

I compare that to her testimony in this courtroom; 180 degrees difference in her demeanor. I know what nervous is, and it was nervous here, but it sure wasn't nervous on that tape; it was a joke.

I find it unbelievable that [the victim] – for her to describe how the Defendant, as she did, made her touch his penis; yet, she is unable to provide even the most basic description of the Defendant's penis; how it looked, how it felt. Other than it felt like skin, she could have been talking about my nose. And the State tried and tried to get her to describe it, but she couldn't.

The victim claimed on the witness stand that . . . she never kept a journal. I'm sorry – yeah, she didn't keep a journal, she didn't keep a journal about what had happened; yet, she admitted to the detective in July of '06 that that's exactly what she did; she kept a journal of what happened, and tore it up and tore the page out.

On three separate occasions the victim told the detective that only two people knew about it, three times she kept asking, and the answer was the same; her dad and the U.S. Marshal.

Later she admitted she told Shelby, her friend, and then . . . refused to provide the detective with Shelby's phone number when the detective needed it. Because the victim wanted to talk to Shelby first before the detective could call her. And you know what, she did; she did talk to Shelby, and that certainly blew Shelby's credibility right out of the water when she got on that stand.

These are just the tip of the iceberg in terms of the discredited testimony that I have listened to today, and yesterday, and the day before.

For all these reasons, I sua sponte; on my own motion, grant a new trial as to Count Four.

I strongly suggest to the State to re-evaluate their case, to take a look at this completely one-sided investigation that didn't even include an interview or attempted interview with the Defendant or the victim's mother, and whose entire case is built around a victim who does not have a shred of credibility as far as I'm concerned.

You know, our system of justice is founded on the principle that in America, which is where I think we still live, the greatest fear in this country is that we would allow an innocent man to go to prison for something he did not do. In fact, we would rather a guilty man go free before we would allow an innocent man to go to prison. That's the way this system is built; we'd rather let that happen. This case has turned those principles on its head.

For this reason, I truly believe that this has been a miscarriage of justice.

Court's adjourned.

Thus, as to Count 3, the trial court orally granted the defendant's motion for judgment of acquittal. However, an order entered that day recited that, as to Count 3, the court granted a "Motion of Acquittal as to Count[] 3 or in the alternative for a New Trial." Likewise, the judgment for Count 3 states, "Trial Judge granted Motion for Judgment of Acquittal pursuant to R. 29(d)(2) of Tenn. R. Crim. Pro. or in the alternative for a new trial." It is well established that when there is a conflict between a judgment form and the transcript of the proceedings, the transcript controls. See State v. Moore, 814 S.W.2d 381, 383 (Tenn. Crim. App. 1991); State v. Jimmy Lee Cullop, Jr., No. E2000-00095-CCA-R3-CD, 2001 WL 378543, at \*13 (Tenn. Crim. App., Knoxville, Apr. 17, 2001) (remand for correction of sentence alignment in judgment to conform to that reflected in transcript). Accordingly, since the transcript reflects that the trial court's action as to Count 3 was to grant the motion for judgment of acquittal, we review only that action.

Rule 29(b) of the Tennessee Rules of Criminal Procedure provides, in relevant part, that the trial court shall grant a motion for judgment of acquittal as to an offense when the evidence is not sufficient to sustain a conviction:

On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

In considering a motion for judgment of acquittal, the court is to consider the "legal sufficiency of the evidence and not . . . the weight of the evidence." State v. Thompson, 88 S.W.3d 611, 615 (Tenn. Crim. App. 2000) (citation omitted). Thus, in ruling upon such a motion, the trial court must consider the evidence in the light most favorable to the State, as explained by this court in State v. Blanton, 926 S.W.2d 953, 957-58 (Tenn. Crim. App. 1996):

When the trial court is presented with a motion for judgment of acquittal, the only concern is the legal sufficiency, as opposed to the weight, of the evidence. State v. Campbell, 904 S.W.2d 608 [(Tenn. Crim. App. 1995)]. To determine whether the evidence is insufficient to sustain the conviction, the trial court must consider "the evidence introduced by both parties, disregard any evidence introduced by the accused that conflicts with the evidence adduced by the State, and afford the State the strongest legitimate view of the evidence, including all reasonable inferences which may be drawn from the evidence." Id. (citing State v. Hall, 656 S.W.2d 60, 61 (Tenn. Crim. App. 1983)).

It is clear from the trial court's oral grant of the motion for judgment of acquittal as to Count 3 that the court weighed the evidence and concluded that the victim's testimony was unbelievable. However, the test the court should have applied was whether, taken in the light most favorable to the State, the proof was sufficient to sustain the defendant's conviction for aggravated sexual battery. Applying this test, we conclude that the evidence was sufficient and that the court erred in granting the judgment of acquittal as to Count 3.



Our review of the record shows that portions of the trial court's recall of the evidence was contrary to testimony that was obviously accredited by the jury. First, the trial court found that the victim's demeanor on the first tape of her interview showed "a 12-year-old laughing, joking, stretching, yawning, and playing with her cell phone," which was "completely inconsistent with a child" who was disclosing sexual abuse by her stepfather.

Detective Johnson, however, testified that, although the victim displayed nervous laughter, she did not find it inappropriate. Johnson testified: "I didn't think it was inappropriate. She was nervous. . . . For a child those are normal behaviors. For you and I, no, it is not appropriate." She acknowledged that the victim did not show fear or cry during the interviews but explained that such behavior was not unusual, saying, "Everybody reacts different to different things. . . . [W]hile she reacts one way, another child may react completely different so I don't . . . label any one child in their behavior. Anything is normal." Johnson said that she interviewed the victim five or six times and that, while the victim did not cry during the interviews, she did break down and cry during the telephone call with her mother, during which she "begged her mother for several minutes, to the point of it being painful, that all she wanted was her to believe her, she was telling the truth, this really happened. And she begged and sobbed for her mother to believe her." Johnson said that the victim had not recanted her story.

Second, the trial court found that the victim's friend, Shelby Phillips, was not credible because she had talked to the victim prior to her interview with Detective Johnson.

Detective Johnson, however, testified that she asked the victim for Phillips' phone number, but the victim did not want to give it to her. Johnson said: "[W]e tried to get her to get the cell phone number for me, but since she didn't have her phone I couldn't get that. Then I had to ask her dad to get a phone number for me." Johnson said that she learned, the week before trial, that the victim had talked to Phillips prior to Phillips' interview. Johnson said the victim did not try to hide the fact that she had spoken to Phillips and readily disclosed that information. Johnson said she did not believe her interview with Phillips had been tainted because she did not believe that the victim and Phillips had discussed the facts of the case based upon Phillips' "surprise" reaction when she interviewed her. Johnson explained that Phillips "kind of had a little deer in the headlight look when she came in at first and I introduced myself and did some rapport building like in most forensic interviews and I normally ask do you know why I wanted to talk to you. And if they don't then in this instance I asked do you have a friend named [C.S.] and when I said that, [Phillips] beg[a]n to cry, and she said, oh my God, it's true."

Third, the trial court found that the investigation was "completely one-sided . . . that didn't even include an interview or attempted interview with the Defendant or the victim's mother."

Detective Johnson, however, testified that she tried to interview the victim's mother, but Mrs. Thomas was very uncooperative and said that the victim was lying. When Johnson asked Mrs. Thomas to come to the police department to discuss the victim's allegations, Mrs. Thomas refused to do so and told Johnson if she wanted to talk to her she could come to her house. Johnson then

sent a patrol car to transport Mrs. Thomas to the police station. Johnson said that when Mrs. Thomas arrived, she was “very upset, very irate” and had “a pretty strong” odor of alcohol and was unsteady on her feet. When Johnson confronted Mrs. Thomas about her intoxication, she did not deny it. Johnson said that Mrs. Thomas tried to leave twice while she was talking to her. Johnson subsequently learned that Mrs. Thomas “had counsel” and said she could not contact her as a result.

We now will review the victim’s testimony in ascertaining whether the evidence was sufficient to sustain the defendant’s conviction for aggravated sexual battery. Count 3 of the indictment charged that the defendant had committed aggravated sexual battery of the victim:

The Grand Jurors for Williamson County, Tennessee, duly impaneled and sworn, upon their oath, present that MALCOLM DUDLEY THOMAS, heretofore, to-wit, between April 2005 and June 2006, inclusive, before the finding of this presentment, in said County and State, did intentionally, and feloniously have unlawful sexual contact with a child less than thirteen years of age, whose date of birth is 6/28/1994, in violation of Tennessee Code [A]nnotated, Section 39-13-504(a)(4), a class B felony, and against the peace and dignity of the State of Tennessee.

Subsequently, the State filed a bill of particulars, which provided details as to when the events in Count 3 were alleged to have occurred:

Date of offense: the Monday prior [to] the victim’s birthday [party], which was held on June 23, 2006.

Time of the offense: sometime between approximately 11:00 pm and approximately 2:00 am.

Location of the offense: the victim’s bedroom located at 3119 Bush Drive, Franklin, Tennessee.

Nature of the offense: the defendant touched the victim’s vagina with his hand, the defendant touched the victim’s breast with his hand, and the defendant put his mouth on the victim’s breast. Said contact was on her skin.

Tennessee Code Annotated section 39-13-504(a)(4) sets out the elements of aggravated sexual battery which the defendant is alleged to have committed:

(a) Aggravated sexual battery is unlawful sexual contact with a victim by the defendant or the defendant by a victim accompanied by any of the following circumstances:

. . . .

(4) The victim is less than thirteen (13) years of age.

Tennessee Code Annotated section 39-13-501 defines “sexual contact”:

Sexual contact includes the intentional touching of the victim’s, the defendant’s, or any other person’s intimate parts, or the intentional touching of the clothing covering the immediate area of the victim’s, the defendant’s, or any other person’s intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification[.]

The victim described generally what the defendant did on the occasions when he entered her room at night:

Q. Now, has [the defendant] ever come into your room at night?

A. Yes.

Q. Tell the jurors about that.

A. He would come into my room, I would say, between 12:00 o’clock and 2:00 – sometimes it was earlier, sometimes it was a little later – he would come in there. My mom would already be asleep; she went to bed pretty early. He would come in there and . . . he would come up to my bed and . . . he would be wearing sweats, or sometimes he would be wearing just regular shorts, or just whatever, and he would come and he would start touching me . . . .

And sometimes I’d be asleep, sometimes, I would be kind of dozing, sometimes I would be awake.

And in the case that I was awake, whenever he would walk in, I’d tell him go away, and –

Q. Now . . . so I take it from your answer that . . . this happened on more than one occasion; is that right?

A. Right.

Q. How long a period of time did this go on?

A. Like, how long, like how many – like in a night how long or –

Q. Like from what age were you when it started until when it stopped.

A. I would say I was seven or eight.

Q. And when did it stop?

A. Two years ago.

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Q. Okay. Where would he touch you?

A. He would touch me on my breasts and on my private area. And, like, just he would do that for awhile.

Q. Now, when you say your private area, what are you referring to?

A. My vagina.

Q. And what would he touch you with?

A. His hands.

Q. Would this be on – were you wearing clothes?

A. Uh-huh.

Q. Would this be on top of your clothes or underneath your clothes?

A. He would reach his hand under my shirt and put his hand down my pants.

Q. And when he would reach underneath your shirt, what would he do?

A. He would just rub his hands over my breasts and . . . sometimes I would be wearing a bra, sometimes I wouldn't, and he would just . . . if I was wearing a bra, he would . . . stick his hand underneath my bra and then, like, rub his hands over my breasts.

Q. What type of clothing would you have on?

A. Just sleep pants and a big shirt; t-shirt.

Q. Then you mentioned sometimes you wore a bra; what type of bra was it?

A. It was like the sports bra type, it was like elastic.

Q. Now, you told us about him touching your breast with his hand, and you mentioned earlier that he touched your private area, so what would he touch your private area with?

A. His hands.

Q. Can you tell the jury what he would do with his hands on your private area?

A. He would just rub his hands over it and just kind of like caress it and, you know—

Q. Would that be on your clothes or on your skin?

A. On my skin.

Q. Did he ever touch any part of your body with any other part of his body besides his hand?

A. Yes.

Q. Tell the jury about that.

A. Sometimes he would touch my breasts with his mouth, and he tried with his mouth to touch my private area.

Q. Let's talk a little bit about where you said he put his mouth on your breast; would that be on your clothes or on your skin?

A. On my skin.

Q. And how would he get to your skin with his mouth?

A. He would lift my shirt up; and if I was wearing a bra, he would lift my bra up too.

Q. Would he do anything with his mouth?

A. He would just move his tongue over it and just —

Q. Now, you said that he tried with his mouth to touch your private area; what do you mean by that?

A. He moved his mouth a — like, lower than my belly button, . . . and he would move his mouth like where my legs are, like around that area.

Q. Would that be on your clothes or on your skin?

A. On my skin.

Q. How would he get to your skin that way?

A. He would pull my pants down.

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Q. Do you remember your 12th birthday?

A. Yes.

Q. Okay. Did y'all have a party?

A. Uh-huh.

Q. Tell the jurors about your 12th birthday party.<sup>5</sup>

A. It was, like, a Hawaiian theme, we had, like, little leis around the house. It was . . . I'd say, 30 kids. There [were] some parents that stayed and they helped out. It was, you know, just – my step-brother's band was there. We just were having fun.

Q. Do you remember when that was held?

A. June 23rd, 2006.

Q. That's not your actual birthday?

A. Right.

Q. All right. Now, did anything happen with the [d]efendant on that day?

A. No, because I had a bunch of girls stay the night, and he never did anything when I had people spend the night.

Q. Do you remember did anything ever happen after your 12th birthday?

A. No.

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<sup>5</sup> According to the bill of particulars, the aggravated sexual battery alleged in Count 3 occurred on the Monday before the party for the victim's twelfth birthday.

Q. What's the last time you remember something happening with the [d]efendant touching you prior to your birthday?

A. It happened the Saturday and the Monday prior to my birthday party.

Q. How do you remember that?

A. Because I remember . . . I went to my Mom's house that Saturday and . . . I just remember because . . . I was kind of dozing because I was up thinking about my party and thinking about what I would do, you know, who was going to come, like, I had already – just thinking about who would reply and say they were coming.

Q. Was this time when you're talking about kind of dozing, was that the Saturday or the Monday?

A. I was kind of dozing both times.

Q. Let's talk a little bit about the Saturday – <sup>6</sup>

A. Right.

Q. – before your birthday party. Do you remember what y'all had done that day?

A. I don't.

Q. Had y'all been planning for the party or anything like that?

A. Yes.

Q. And do you remember what [the defendant] did that evening when he came into your room?

A. He just – he used his hands; he didn't use his mouth that Saturday or that Monday. He just – he would just . . . rub my breasts and rub my private area.

Q. And what about on the Monday, what did he do on Monday?

A. The same thing; he didn't use his mouth.

Contrary to the court's view, we conclude that, viewed in the light most favorable to the State, the evidence was sufficient to support the defendant's conviction for aggravated sexual battery,

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<sup>6</sup>The Saturday incident was alleged in the indictment as Count 2.

as charged in Count 3. As we have stated, the State's bill of particulars set out, as to that count, that it occurred on the Monday before the victim's twelfth birthday party and consisted of the defendant's "touch[ing] the victim's vagina with his hand, . . . touch[ing] the victim's breast with his hand, and . . . put[ting] his mouth on the victim's breast. Said contact was on her skin." To sustain a conviction for aggravated sexual battery, the State was required to prove that the victim was less than thirteen years of age at the time of the incident, which was not contested, and that the defendant intentionally touched with his hand the victim's vagina or breast or put his mouth on her breast. As to that Monday, the victim testified that the defendant "rub[bed] [her] breasts and rub[bed] [her] private area." By convicting the defendant of aggravated sexual battery, the jury obviously accredited the victim's testimony, as was in its province. We conclude, therefore, that a rational jury could find beyond a reasonable doubt that the defendant committed the offense of aggravated sexual battery and that the trial court erred in granting the motion for judgment of acquittal.

### **CONCLUSION**

We reverse the trial court's granting the motion for judgment of acquittal as to Count 3 and remand for entry of a corrected judgment, for sentencing as to this conviction, and for reinstatement of the \$15,000 fine imposed by the jury. Since the defendant was convicted of violating Tennessee Code Annotated section 39-13-504 and this court is reinstating the conviction, he is to be returned to custody, for he is not entitled to bail "notwithstanding sentencing hearings, motions for a new trial, or related post-guilt determination hearings." Tenn. Code Ann. § 40-11-113(b).

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ALAN E. GLENN, JUDGE